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September 29, 1997

VIA Messenger

William F. Caton, Acting Secretary
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, DC 20554

RECEIVED

SEP 29 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: CC Docket No. 94-129 - Further Notice of Proposed Rulemaking

Dear Mr. Caton:

Enclosed for filing please find an original and eleven (11) copies of the Reply Comments of The Direct Marketing Association in the above-referenced docket. Also enclosed is a 3.5" diskette containing a "read-only" version of the comments compatible with WordPerfect 5.1 software.

We are also this day forwarding two (2) copies of the Comments to the Common Carrier Bureau's Formal Complaints Branch, one (1) copy to Cathy Seidel of the Common Carrier Bureau (along with a diskette version), and one (1) copy with ITS.

Finally, we are also sending one (1) extra copy of the Supplemental Comments, which we ask that you date-stamp and return to the messenger. We appreciate your assistance.

Please do not hesitate to contact me if you have any questions.

Sincerely,


Heather L. McDowell

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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SEP 29 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of the Subscriber)
Carrier Selection Changes Provisions)
of the Telecommunications Act of 1996) CC Docket No. 94-129
)
Policies and Rules Concerning)
Unauthorized Changes of Consumers')
Long Distance Carriers)

REPLY COMMENTS
OF THE
DIRECT MARKETING ASSOCIATION

The Direct Marketing Association ("The DMA") submits these Reply Comments, in response to the Further Notice of Proposed Rulemaking, to join other parties in urging the Commission to more precisely define what constitutes "slamming." By providing clearer guidance about what slamming truly is, the Commission's PIC change verification rules would properly focus on the conduct that causes an unauthorized PIC change, rather than the communications media that a carrier uses to market its services or confirm subscriber orders. Such guidance would render unnecessary the pending proposals, which in any event, are ill-advised, to further restrict the PIC change verification procedures.

It is not necessary for the Commission to establish a new "slamming" regulation, in addition to the existing PIC change verification rules. But if, as it should, the Commission enforces its existing PIC change rules only to prevent slamming, and takes action under its general enforcement authority against those actually engaged in slamming, then it must provide a *considered* working definition of what that term means.

The current "definition" is more an accident than a deliberate effort to draw a line between lawful and unlawful conduct. Neither the Act nor the Commission's rules define slamming. Only after the Commission incorporated the term into a consent decree^{/1} did it come into common usage. Since then, primarily through repeated use in Commission Orders, what was once mere slang has been elevated to a legal standard. But the prescribed conduct has never been defined.

The Commission has often referred to slamming as "the unauthorized conversion of a consumer's [IXC] by another IXC."^{/2} This is utterly inadequate. No matter how often it is invoked, the description in use today fails to put carriers on notice as to what constitutes an "unauthorized" PIC change, and encompasses innocent mistakes in securing PIC authorizations, as well as deliberate attempts to mislead. There is thus a need for greater guidance. A

^{/1} Cherry Communications, Inc., 9 FCC Rcd. 2086 (1994).

^{/2} See, e.g., Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, Further Notice of Proposed Rulemaking ("1997 FNPRM"), CC Docket No. 94-129, n. 14 (Released July 15, 1997).

definition along the lines proposed by the America's Carriers Telecommunication ("ACTA")³ would fill that need. Most importantly -- as The DMA stressed in its original comments -- any definition of slamming must properly center the issue on fraudulent or deceptive representations, or reckless disregard for the fraudulent or deceptive nature of conduct that leads to an unauthorized PIC change. This is precisely where the Commission should direct its efforts - enforcement against deceptive representations or omissions that induce the unwary consumer to unwittingly switch carriers, or against carriers that falsify outright a consumer's consent.

A definition resembling the ACTA proposal would also properly exclude inadvertent errors (e.g., unknowingly transposing two digits of a telephone number), as well as instances in which, for one reason or another, a subscriber simply has a change of heart (e.g., one spouse disagrees with the other's selection). While consumer complaints may erroneously call these occurrences "slamming," the Commission should not. Carriers should not be penalized for innocent mistakes.

At the same time, The DMA opposes the suggestion that the definition include "assisting" in effecting a PIC change without the subscriber's verifiable authorization. This all-encompassing phrase serves only to invite the same ambiguity and confusion the remainder of the definition carefully works to avoid.

³ Comments of the America's Carriers Telecommunications Association, page 10, ¶ 17, in 1997 FNPRM.

And, it is patently unnecessary. The Commission's proposal to establish distinct liability standards for "submitting" and "executing" carriers will address situations in which more than one carrier may be responsible for a slamming incident. Beyond this, carriers are, by statute, responsible for the acts or omissions of their agents⁴ and private remedies are available if an agent violates a marketing contract by engaging in slamming.

The DMA, therefore, urges the Commission to adopt a working definition which states that slamming occurs not merely because a carrier fails to verify a PIC change, but where the carrier has either (1) failed to obtain a subscriber's consent, including instances in which it falsifies consent; or (2) secures a subscriber's consent through deception.

The adoption of this working definition would make it unnecessary for the Commission to expand its current verification procedures. The current verification rules provide carriers an effective means of rebutting claims that a particular PIC change was procured by deceptive conduct. But, there is no need to expand those procedures.

In this Docket, the Commission has proposed to require verification of inbound telemarketing calls, and is considering whether it should eliminate the "welcome package" verification option. This would be bad policy and law: The proposed new rules would penalize the means by which legitimate sales are obtained and verified, rather than conduct that generates sham sales, and, in the

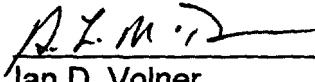
⁴ 47 U.S.C. § 217.

latter case, raise constitutional concerns. New verification rules will not stop fraud and deception, which is what primarily causes well-founded slamming complaints. Added restrictions on the way carriers verify their sales will not stop those bent on misleading consumers in the first instance. By contrast, careful definition of slamming correctly focuses the inquiry on a carrier's conduct and marketing claims, not the medium it chooses to use to make such claims or to verify subscribers' knowing consent. The problem is the message subscribers receive, not the way they receive it.

False or deceptive advertising and marketing causes slamming; telemarketing -- and particularly inbound telemarketing which is self-verifying and the "welcome package" do not. The means by which a carrier or its marketing agent conscientiously ensures that a subscriber has in fact requested and consented to a PIC change cannot be blamed for fraud. As ACTA noted in its comments, adopting a sensible definition of the problem is the first step to solving the problem. The Commission can, then, tackle slamming directly; it is a waste of Commission resources, and an inexcusable burden on carriers and their agents, to try to combat hard core fraud with procedural rules that choke

legitimate marketing efforts but provide absolutely no offsetting benefit for consumers.

Respectfully submitted,



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